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ABSTRACT

A number of legal issues are involved in conducting a drug testing program to determine whether students--and occasionally teachers--are using illegal drugs. Two legal issues have been raised concerning the accuracy of the urinalysis test: whether it is chemically accurate and whether appropriate procedures have been followed to make certain that the tests apply to the right specimen. In "Patchogue-Medford Congress of Teachers v. Board of Education," the New York State Court of Appeals struck down a program of blanket testing for all probationary teachers as a condition of obtaining tenure and held that the appropriate standard to apply to the testing of an individual was that of "reasonable suspicion." A New Jersey state court held that school authorities must meet the test of reasonable suspicion for the individual students tested and struck down the contemplated mass screening program of all students. The mass testing of student athletes has not been addressed by a court of record. Among the conclusions and recommendations provided for school administrators are the following: (1) mass, or even random, urinalysis testing programs are very questionable for both teachers and students; (2) individual testing must be carried out under very strict procedures; and (3) justification for disciplinary action, even with positive tests, is questionable. Appended are 16 footnotes. (MLF)

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A Legal Memorandum

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DRUG TESTING

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Despite some indications that the use of illegal drugs by teenagers may be declining[1]--and that such usage as there is does not occur in school[2]--there continues to be strong public demand in many communities for more action by schools and their administrators to eliminate drug usage. One of the methods often proposed is the use of physical tests to determine whether students--and occasionally teachers--are using illegal drugs.

A number of legal issues are involved in conducting such a program, especially in public schools, and very few have been totally resolved as yet, at least in court decisions with published opinions. Nevertheless, because of the widespread and continuing interest in the subject and the many questions that have been raised about it by principals, it seems worthwhile to discuss the issue and attempt to provide some guidance on it.

Scientific Factors

While medical technology has provided a number of approaches to determining whether an individual has recently used various kinds of illegal drugs, the most common test by far is one administered by taking a urine sample and applying certain chemical tests to that sample. Because of its relatively low cost ($15 to $25 each) and its ease of administration, this is the test that has been applied most often in the school context, and also the one most often subject to legal challenge.

Two legal issues have been raised concerning the accuracy of the test: whether it is chemically accurate, and whether appropriate procedures have been followed to make certain that the test results apply to the right specimen. There is still considerable argument as to the chemical accuracy of the tests themselves, because of the so-called identification of "false positives" caused by the ingestion of legal substances that have some chemical similarities to the illicit drugs the tests are designed to detect. As a result of this problem, several courts have held that it would be arbitrary and capricious to fire an employee based solely upon a single positive test of this kind.[3]

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To avoid this situation most private employers using urine screenings have provided for an automatic follow-up test of any subject on whom a positive report is returned. The follow-up test usually employs a different technique, and it is generally agreed that the combination process produces results that are 99 percent accurate.[4]

The other evidential challenge that can arise from the use of urinalysis concerns what is commonly called the "chain of custody," a common problem in criminal cases. Anyone seeking to use a test program, particularly one in which large numbers of persons are tested, must make sure that detailed procedures are established and followed to provide reasonable assurance that all test samples are, in fact, those provided by the donor, and not someone else.

Errors can result both from accidental mix-ups of specimens and the intentional exchange of specimens by a drug user to avoid detection. Failure to provide assurance that a positive test result was based on the proper specimen can result not only in falsely identifying an innocent person as a drug user, but can also result in missing actual users. Unfortunately, some efforts to meet this problem, such as requiring persons tested to give specimens while under observation, lead to other legal problems.

Search and Seizure

While the scientific accuracy of drug tests and their methods of administration have been the subject of some objections, the more common source of complaints about drug testing has been the claim of violation of constitutional rights.

The primary complaint in this area has been that drug testing, particularly by means of urinalysis, constitutes a search and seizure under the Fourth Amendment, and is consequently only permissible under the rules normally applicable for other searches and seizures.

Whether this contention is correct in a given circumstance usually hinges on whether the individual has a legitimate expectation of privacy.[5] That, in turn, depends first on whether the person has "an actual expectation of privacy, and second, that the expectation be one that society is prepared to recognize as reasonable."[6]

These standards, developed in criminal cases, have now been applied to the issue of drug testing in the area of public employment when an employee is required to produce a urine specimen for analysis. Recently, these principles were applied in a school case, Patchogue-Medford Congress of Teachers v. Board of Education,[7] and the New York state Court of Appeals, the state's highest Court, struck down a program of blanket testing for all probationary teachers as a condition of obtaining tenure.

Finding a legitimate privacy interest to exist on the part of the teachers, the court also found, however, that the schools had a legitimate interest in keeping drug-using teachers out of the school. In such circumstances, it is the duty of the court to balance the two interests against each other and see which should prevail. In the effort to do this, the court looked particularly at the nature of the teacher's job and contrasted it with other kinds of public positions for which mandatory testing of all employees has been upheld. In recent years they have included police officers, firefighters, bus drivers, and railroad train engineers.

In the Patchogue-Medford case, however, the court found that the ordinary work of classroom teachers did not present the kind of situation that would justify the kind of interference with constitutional rights the testing program would involve. The court therefore struck down the blanket testing program.

Another issue dealt with by the New York Court in Patchogue-Medford was the appropriate standard to apply to the testing of an individual teacher. Here, the New York court disagreed with the teachers' claim that the higher standard of "probable cause" should be applied, noting that this standard--usually requiring the authority to get a search warrant--was more appropriate when a search is undertaken for the purpose of discovering evidence for use in a criminal proceeding.

In the administrative setting of a school, however, in which the only purpose was to protect the educational process, the more appropriate standard was that of "reasonable suspicion" as applied by the Supreme Court of the United States in a student search.[8]

A similar approach was taken by a federal court in another recent school case involving a bus attendant whose primary duty was assisting handicapped children on and off school buses. The district required urine screening as part of its medical examination and the employee refused. As in the teacher case, the judge found that such a requirement "without particularized reason to believe that plaintiff used, possessed, or was under the influence of drugs" was unreasonable in absence of some more specific reason to suspect the employee of drug use.[9]

While not stating the standard to be applied in the usual terms, the court made clear that it placed major emphasis upon the nature of the employee's duties, and distinguished those duties from that of a bus driver who might more reasonably be expected to be totally free of drug usage.

The issue of the appropriate legal test for conducting drug tests by urinalysis has also been reviewed in at least one reported decision involving public school students, although the decision was rendered by a relatively low-level state court. As in the employment cases, the New Jersey court held that school authorities must meet the test of reasonable suspicion for the individual students tested, and struck down the mass screening program of all students which had been contemplated.[10]

The court took this position despite the fact that the school district's testing program was part of a routine physical examination intended only to identify physical defects, illnesses, and communicable diseases, as well as the presence of nonprescription drugs. In addition, as part of the policy governing the program, no disciplinary action was to be taken against students who were found to test positively for the presence of drugs.

Instead, parents would be notified, and after a meeting with them and the student, a determination would be made as to the appropriate treatment of the student, exactly as would be the case for any other illness or condition discovered through the examinations. Finally, because a state statute required certain determinations to be made (levels of protein and sugar in the body) the court agreed that urinalysis was a reasonable, if not necessary, part of its physical examinations.

Nevertheless, it disapproved the use of the chemical tests for the presence of drugs, finding that the basis for conducting those tests must be determined individually in each case. The court based its conclusion on the fact that the district had disciplinary policies that could be brought into effect as a result of test results, even though that was not their purpose. The blanket drug screening was, therefore, found to constitute a violation of student Fourth Amendment rights.

Other Constitutional Rights: Due Process

The New Jersey student case provides a good illustration of the degree to which Fourth Amendment objections can often evolve into more general constitutional objections, especially as they relate to due process under the Fifth and Fourteenth amendments. Essentially, the argument made on this basis was that a New Jersey statute (other than that dealing with the physical examinations) provided for suspension of students found to be in violation of school policies prohibiting illicit drug activity. The statute further provided that students suspended under the law had to be provided due process under the Fourteenth Amendment.

Accordingly, the Court found that, even though the examinations were not intended to be part of a disciplinary program, the obligation to take disciplinary action under state law required that due process considerations be applied, and labeling the examination procedure as "medical" rather than disciplinary could not insulate it from appropriate constitutional protections.

There are still other problems involved in the use of the standard urine tests for the presence of drugs. These may be regarded as having constitutional implications under the general notion of "substantive due process," and have been the source of judicial concern.

Substantive due processs requires that a reasonable relationship exist between a procedure like a drug test and the purpose for its administration. This relationship has been found to be absent in some of the drug-testing

cases involving employment, such as that of the bus attendant whose job did not necessarily require that she be totally drug free.[11]

Critics of drug-testing programs--and especially those conducted by urinalysis--have pointed out that the tests only indicate the presence of chemical substances in the body. Unlike some other kinds of tests, such as breathalyzer tests for alcohol, for example, urinalysis does not measure the amount of drug present. Nor does it indicate how long before the test was administered the drug was taken into the body. While there is some disagreement in the scientific community about how long a given drug may still show up in a urine specimen, it is conceded by all that it is at least a matter of days.[12]

It is, therefore, perfectly plausible that a person showing a positive test result for marijuana may well have used the drug outside the school day, or even during the previous weekend, and be completely unaffected by that use at the time of the test. These facts cast serious doubt upon the relevance of the test, even if its scientific validity is beyond question.

These considerations played a major part in a school case called Anable v. Ford[13] which involved the suspension of a female student whom school authorities suspected of smoking marijuana in a school restroom. The student in question had been one of three girls present in the lavatory at the time, and verbal evidence secured from them was contradictory. The school therefore asked all three to submit to a urine test and all were tested with parental consent.

One girl who tested positive withdrew from school and lost credit for the semester. Subsequently, however, she brought suit against the district, claiming that she had not smoked the marijuana at school but had, indeed, smoked it the previous weekend.

The court ruled in favor of the student, partly on the due process ground that she had not been informed of the evidence upon which the school had acted in the first place (another student's accusation), and because she had only consented to taking the test because she was given the impression that it was required of her.

The court was also concerned, however, about the relevance of the test since it could not determine when or where the drug found in her body had been ingested. If the girl's story was true, the conduct in question had not occurred at school. Finally no evidence was presented to show that the student's behavior at school was affected by the presence of the drug in her body. In such circumstances disciplinary action by the school was regarded as being beyond the school's authority to control.

It is also at least possible that, under some circumstances, drug use might be regarded as a handicapping condition under the terms of the Handicapped Act of 1973 or P.L. 94-142, the Education for All Handicapped Children Act.

It is true that the Handicapped Act states that it is not intended to cover "any individual whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or safety of others."[14]

On the other hand, the mere presence of a drug in the body as identified by a urine test does not mean that an individual's work has been adversely affected, so the positive drug test does not necessarily exclude a person so identified from the Act's protection.

A number of states have provisions similar to that of the federal law in their own statutes. So far, the law is unclear as to when or whether employees identified as drug users, but who are able to perform their duties, might be able to seek protection under these statutes.

Should they be found to apply, however, the employer must make a reasonable accommodation to the employee, and at least one commentator has suggested that employers in colleges and universities should meet this requirement by providing such employees with some kind of counseling or leave of absence in order to get therapy.[15] Thus far, no court seems to have considered similar claims regarding students under P.L. 94-142.

Testing of Student Athletes: A Special Case

While mass or random testing of students has not stood up well against initial challenge in the courts, similar programs confined to members of interscholastic athletic teams have been treated somewhat differently. At the college level, for example, the NCAA has mandated that athletes playing under programs it sanctions must be screened for the presence of drugs before participation in post-season competition will be permitted. Many colleges, including public institutions, have followed the NCAA's lead and instituted screening programs of their own.

So far, although the issue has been discussed by legal commentators, no court of record seems to have addressed the legality of such requirements. Student athletes certainly have the same constitutional rights as other students, but there are two bases for making a distinction between athletic team members and other students which might apply in this case.

First, there is considerable precedent for contending that a student's participation in extracurricular activities is not protected by the Constitution in the same way as his attendance at a public school generally.[16]

Schools can also argue that, just as some kinds of employment can be subject to greater control by the use of drug testing than others, depending on the degree of public safety and welfare the employment affects, so must certain kind of student activity be differentiated from others.

In the case of athletics, the risks of physical injury both to the individual student participating and to those against whom he or she may be competing arguably justifies the interference with the privacy interest that a drug testing may represent. Whether this interest is sufficient to justify a testing program for all athletes or a random selection test program still remains open to question.

Conclusions and Recommendations

Mass or random testing. Technical problems in the use of the usual kinds of urinalysis testing programs, such as the identification of "false positives" together with legal claims based upon the Fourth and Fourteenth Amendment of the U. S. Constitution, have made the use of such programs on a mass or even random basis very questionable for both teachers and students in public schools. Such programs will probably withstand legal challenge if limited to students applying for interscholastic athletics, but only if the rationale is clearly based on safety considerations.

Individual testing. Where there is sufficient evidence to constitute "reasonable suspicion" of drug usage, individual students or employees may be required to submit to testing in order to confirm such usage or the absence of it. In the case of employees, however, care should be taken to ensure that the district's authority in this respect is not limited by agreements negotiated with employee associations.

Even when testing is done on an individual basis, it is important that it be carried out under very strict procedures to make sure that the "chain of custody" of all specimens is protected against legal challenge. Full notice of the program should also be given with provision for some kind of hearing and review in case of a positive finding. Because of the possibility of "false positives," such results of urine tests should be confirmed by retests using a different method.

Disciplinary actions. Even when tests positively confirm the presence of illegal drugs in the body of a student or employee, there is some question as to whether this is sufficient to justify disciplinary action in absence of evidence that the individual concerned has used the drug at school or been affected in a way that either endangers others in the school community, has been disruptive of the educational process, or in the case of an employee, has interfered with the full performance of his or her duties.

In the latter case, only if the employee's job directly implicates health or welfare considerations, as in the case of school bus drivers, would the mere presence of an illicit drug in the body be sufficient to justify immediate suspension or removal of an employee from his or her duties.

When all these considerations are taken into account, a district may well decide that if it is to use a drug testing program, it is better to do so in conjunction with a therapeutic treatment program rather than for disciplinary purposes.

Footnotes

1. The National Clearinghouse on Drug Information of the National Institute of Drug Abuse notes that the number of high school seniors reporting use of marijuana within 30 days of being surveyed declined steadily from a high of 37.1 percent in 1978, to 25.2 per cent in 1984, at which level it seems to have leveled off. The number of students reporting daily usage has dropped even more sharply from a high of 10.7 percent in 1978, to 4.9 percent by 1985. Drug Use Among American High School Students, College Students, and Other Young Adults: National Trends Through 1985.
2. The Association of California School Administrators (ACSA) reported very recently on a survey of 40,000 students in grades 6 to 12 that of the places of usage for drugs or alcohol, the school is the least likely. About two percent reported the use of marijuana at school, while more than 25 percent report such use at their homes or the homes of friends.
3. Jones v. McKenzie, 628 F. Supp 1500 (D.C. Dist. Col. 1986); see also Storms v. Coughlin, 600 F. Supp 1214 (S.D. N.Y. 1984)
4. National Institute on Drug Abuse, Urine Testing for Abuse of Drugs (1986).
5. Terry v. Ohio, 392 U.S. 1 (1968).
6. Katz v. United States, 389 U.S. 347, 361 (1967).
7. 119 A.D. 2d 35, 505 N.Y.S. 2d 888 (1986).
8. New Jersey v. T.L.O. 469 U.S. 325, 105 S.Ct. 733 (1985) For additional explanation see "A Legal Brief" entitled "Student Searches Revisited--What Is the Standard?" by P. A. Zirkel and I. B. Gluckman in May 1985 NASSP Bulletin.
9. Jones v. McKenzie, supra, note 3 at page 1507.
10. Odenheim v. Carlstadt-East Rutherford Regional School Dist. 510 A.2d 709 (N.J. Super. Ct. 1985).
11. See footnote 9, supra.
12. Some experts have stated that urinalysis may yield a positive result for marijuana ingested as much as two months before the test. See National Institute on Drug Abuse report, Urine Testing for Abuse of Drugs (1986).
13. 653 F. Supp. 22 (W. D. Ark. 1985).
14. 29 U.S.C. Sec. 706(B).
15. Rothstein, Section 504 of the Rehabilitation Act, 13 J.C.U.L. 229, 260 (1986).
16. See, for example, Albach v. Odle, 531 F. 2d 983 (U.S. Ct. of App. 10th Cir. 1976).

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